ARKANSAS COURT OF APPEALS
NOT DESIGNATED FOR PUBLICATION
JOHN MAUZY PITTMAN, CHIEF JUDGE

DIVISION II

CA06-891

April 11, 2007

RAYMOND J. BERRYMAN and SARAH J. BERRYMAN
APPELLANTS
v.

FADIL BAYYARI, as Trustee of the FADIL BAYYARI REVOCABLE TRUST, and SPRINGDALE SCHOOL DISTRICT NO. 50
APPELLEES

AN APPEAL FROM WASHINGTON COUNTY CIRCUIT COURT
[No. CV 04-1506-2]

HONORABLE KIM SMITH, CIRCUIT JUDGE

AFFIRMED

Appellants Raymond and Sarah Berryman bring this appeal from the circuit court's grant of a directed verdict in favor of appellee Fadil Bayyari, Trustee of the Fadil Bayyari Revocable Living Trust u/t/a January 31, 1997 ("Bayyari"), on their claim for specific performance of an alleged oral agreement by Bayyari to sell three acres of land to the Berrymans. The circuit court held that the Berrymans' claims were barred by the statute of frauds. The Berrymans assert two points on appeal challenging the propriety of the directed verdict. We affirm.

Background

The Berrymans own approximately 6.25 acres in Springdale, along the east side of Old Wire Road. Dodd Avenue runs east and west and divides the Berryman property, with

approximately one acre situated north of Dodd Avenue. The Berrymans acquired the one-acre tract from Bayyari in June 2003, after Bayyari purchased the property and a subdivision from the previous owners. This subdivision lies east of the Berryman property and south of Dodd Avenue. The three acres at issue in this case lie immediately east of the Berryman property and north of Dodd Avenue. After the purchase of the one-acre tract in June 2003, the Berrymans approached Bayyari about purchasing additional property, according to the Berrymans, in exchange for granting Bayyari two easements. One of the easements would be used to widen Dodd Avenue. The other easement would be used as a utility easement for Bayyari's subdivision south of Dodd Avenue. Bayyari contacted a local title company and instructed his engineer to prepare a legal description of the three acres.

In January or February 2004, Bayyari learned that appellee Springdale School District was in need of land to build a middle school, and he offered to give the District the land it needed. Bayyari informed both the District and the Berrymans of the other's interest in the property. As a result, in January or February 2004, Mr. Berryman met with representatives from the District regarding the three acres. He also met with officials from the City of Springdale. These meetings were unsuccessful in resolving the dispute. Bayyari subsequently donated the property to the District.

On September 2, 2004, the Berrymans filed suit against Bayyari seeking, in part, specific performance of the alleged oral agreement. The complaint asserted causes of action based on constructive trust, actual and constructive fraud, breach of contract, and promissory estoppel. The Berrymans amended their complaint to add the District as a defendant. Both

Bayyari and the District denied the material allegations of the complaint and asserted that the Berrymans' complaint was barred by the statute of frauds.

The Evidence

Raymond Berryman, a licensed contractor, testified that he and Bayyari discussed an exchange of the three acres in return for the grant of two easements across Berryman's property. Berryman said that Bayyari agreed to sell three acres at his (Bayyari's) cost in exchange for the easements. He stated that the location of the three acres was not agreed upon until December 2003 and that Bayyari had the legal description for the property prepared. Berryman said that there was never a written offer-and-acceptance concerning the sale of the property. In April 2004, the Berrymans executed one of the easement conveyances.

According to Berryman, Bayyari informed him that the District was interested in the property for a future school site. Berryman met with Dr. Ronnie Bradshaw from the District regarding the three acres. Berryman said that he never indicated to the District's representatives or Bayyari that he no longer wanted the three acres. When Bayyari showed him a letter committing to convey the property to the District, Berryman said that he was shocked and that he wrote a letter stating that he would not grant the second easement.

On cross-examination, Berryman said that the consideration for the three acres was $60,585 and conveyance of the two easements. He also agreed that Bayyari was not obligated to give him a deed until he did all three things. He acknowledged that he never paid Bayyari for the property or gave him the second easement but asserted that it was Bayyari who prevented the transaction from being completed. Berryman admitted that he did not have

a document signed by Bayyari agreeing to convey the three acres and that he had not been in possession of the property or made any improvements to it. According to Berryman, there was no written document prior to April 2, 2004, linking the conveyance of the three acres with the conveyance of the easements. He said that the work on the easement across the one-acre tract began in January or February, prior to the grant of the easement on April 1. However, he said that he made no effort to rescind the easement after he learned that Bayyari had committed to giving the three acres to the District.

Helen Bingamin, an abstractor and title agent, testified that she prepared a full set of documents to be used to close the transaction between the Berrymans and Bayyari. These documents included a legal description of the property prepared by Charles Presley, the engineer for the subdivision project, and faxed to Bingamin. Bingamin said that there was a handwritten note on the legal description stating "three acres at $20,195 per acre, for a total of $60,585," but she did not recognize the handwriting. She said the only signed document in her file was the title commitment that she signed. She stated that she had never been authorized by Bayyari to dispose of his property. She said that it was fairly common to open a file and request a title commitment but never close the transaction.

Charles Presley testified that he prepared a handwritten legal description for the three acres and faxed the description to Bayyari. He was not certain whether he also faxed the description to the title company. He said that the handwritten notations of the price being three acres at $20,195 per acre and that the buyers were "Raymond Joseph Berryman and Sarah Jean Berryman" were not in his handwriting. Presley recalled having conversations with Mr. Berryman regarding the easement over the one-acre tract to be used to widen

Dodd Avenue and stated that it was possible that he gave Berryman documents to sign regarding the easement. He could not recall whether the conversations regarding the easement occurred before or after the Berrymans completed the purchase of the one-acre tract in June 2003. Presley testified that the legal description was prepared at Bayyari's request and was intended only for Bayyari. He said that he was not authorized to act on behalf of the trust to convey any trust property.

Kyle Presley, an engineer and Charles Presley's son, testified that he did not recall a December 2002 conversation recounted by Mr. Berryman wherein they discussed the need for an easement. Presley testified that the deed for the purchase of the one-acre tract did not include an easement but that he and Berryman did discuss the need for an easement. He said that the easement over the one-acre tract was needed in order to give the subdivision more usable building area. According to Presley, it was always intended that the easement would go over the one-acre tract even prior to Bayyari's involvement in the project. Presley stated that Berryman never linked the easement over the one-acre tract with the purchase of the three acres.

Fadil Bayyari testified that he made handwritten notations on the faxed legal description prepared by Charles Presley stating a purchase price of $60,585 and stating that the buyers were "Raymond Joseph Berryman and Sara Jean Berryman." These documents were provided to the title company, not the Berrymans. He said that Raymond Berryman changed his mind about the transaction. Bayyari said that it was it was not a "big deal" to obtain easements after the fact.

According to Bayyari, he had to obtain an easement from the Berrymans in order to widen Dodd Avenue, a necessary step in obtaining final approval for the subdivision. He denied that the easement was linked to the purchase of the additional three acres, adding that this was the only leverage the Berrymans had in the transaction. Bayyari said that the easements were not even discussed until early 2004 when he was ready for the final approval of the subdivision plat.

Bayyari said that, in February 2004, he learned that the District was in need of twenty-five acres of land to accommodate a middle school and that he met with the District's Dr. Bradshaw and Dr. Rollins to discuss the matter. He said that he told Bradshaw and Rollins that he had twenty-five acres but that he was in negotiations with the Berrymans to sell three acres. Bayyari admitted that he had promised the three acres to the Berrymans, adding that he probably would have sold the three acres to the Berrymans if not for the needs of the District.

According to Bayyari, after Mr. Berryman and the District's Dr. Rollins met, Berryman called Bayyari to discuss the meeting with Rollins and said that he was no longer interested in the three acres. Bayyari said that he confirmed Berryman's intention with Rollins and, as a result, called off the closing. He did not directly ask Mr. Berryman if he was still interested in the three acres. After the conversations with Berryman and Rollins, Bayyari said that he and Dr. Bradshaw had a conversation regarding whether Bayyari was still interested in donating the land to the District. Bayyari followed up with a letter dated March 31, 2004, agreeing to donate the twenty-five acres to the District.

Bayyari added that the easements were not mentioned in the notations given to the title company. He described his "commitment" to the Berrymans as an "understanding as a professional." Bayyari said that he first learned that the Berrymans were still interested in the three acres when he received a letter by fax on April 2, after he had already committed to donating the land to the District. Even in that letter, Bayyari said, there was no linkage between the easements and the three acres. That linkage did not come until the Berrymans' April 15 letter. According to Bayyari, the Berrymans never conveyed the easements, paid him for the three acres, or made any improvements on the three acres. He said that Berryman never told him that he (Berryman) was going to insist that there was a deal in place. He acknowledged that the District named a school after him for donating the land.

Motions to Dismiss and the Trial Court's Ruling

At the close of the Berrymans' case, Bayyari moved for a dismissal of the Berrymans' complaint, based on the statute of frauds. The District joined in the motion. They argued that there was no writing signed by Bayyari and that the Berrymans were not in possession nor had they made any improvements to the property in order to take the transaction out of the statute of frauds.

In response, the Berrymans argued that Bayyari admitted that there was a contract and only the terms were disputed. They further argued that there was a writing signed by an employee of the title company and that Bayyari ratified this writing, thereby taking the case out of the statute of frauds. The Berrymans also stated that there had been sufficient partial performance so as to remove the case from the statute of frauds. Citing this court's decision in *Taylor v. Eagle Ridge Developers, LLC*, 71 Ark. App. 309, 29 S.W.3d 767 (2000), the

Berrymans also argued that promissory estoppel/detrimental reliance can take the case out of the statute of frauds.

The trial court granted the motion to dismiss, finding that there was not a sufficient writing to comply with the statute of frauds. The court also found that there was no evidence that Charles Presley had the authority to bind Bayyari with respect to the sale of the property. Although the trial court noted that partial performance will take an oral contract out of the statute of frauds and that the performance must be shown by clear and convincing evidence, the court found that the Berrymans did not take possession of the property, a necessary requirement. Finally, the trial court found that the promissory estoppel theory did not apply in this case. The trial court distinguished the present case from *Taylor v. Eagle Ridge Developers*, *supra*, by noting that there was no contract, written or oral, in the present case while, in *Taylor*, there *was* a written contract. Judgment was entered accordingly on March 21, 2006. The Berrymans filed their notice of appeal on March 23, 2006.

Standard of Review

When a party moves for a "directed verdict" or a dismissal in a bench trial, it is the trial court's duty to review the motion by deciding whether, if it were a jury trial, the evidence would be sufficient to present to the jury. *See Woodall v. Chuck Dory Auto Sales, Inc.*, 347 Ark. 260, 61 S.W.3d 835 (2001). In making that determination, the trial court does not exercise fact-finding powers that involve determining questions of credibility. *Id.*

Arguments on Appeal

The Berrymans first argue that the trial court erred in dismissing their case because there was written evidence of the contract signed and authenticated by Bayyari, and Bayyari admitted the existence of the contract. The statute of frauds, Ark. Code Ann. § 4-59-101(a)(4) (Repl. 2001), provides in pertinent part:

> (a) Unless the agreement, promise, or contract, or some memorandum or note thereof, upon which an action is brought is made in writing and signed by the party to be charged therewith, or signed by some other person properly authorized by the person sought to be charged, no action shall be brought to charge any:
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> . . . .
>
> (4) Person upon any contract for the sale of lands, tenements, or hereditaments, or any interest in or concerning them[.]

The statute requires that a written memorandum be signed by the party to be charged, that is, the party against whom the contract is sought to be enforced in the action. *Blackmon v. Berry*, 57 Ark. App. 1, 939 S.W.2d 863 (1997). The memorandum is also required to contain all the essential terms, such as a description of the property. *Van Dyke v. Glover*, 326 Ark. 736, 934 S.W.2d 204 (1996). In the case at hand, the land was adequately described by metes and bounds. A writing may also fail to comply with the statute of frauds because the time and method of payment are not set forth. *Id.* The purchase price per acre per tract of land was adequately set. The question becomes whether Bayyari "signed" the memorandum within the meaning of the statute of frauds.

A signature may be by initials only. *Ragge v. Bryan*, 249 Ark. 164, 458 S.W.2d 403 (1970). Printing, typing, or stamping a name in the place where a signature should appear is sufficient, if it is intended as a signature. *Id.*; *Lee v. Vaughan Seed Store*, 101 Ark. 68, 141 S.W.

496 (1911); *Dupree v. State*, 50 Ark. App. 271, 906 S.W.2d 315 (1995). The writing in the present case was not sent to the Berrymans; it was sent to Bayyari and forwarded by him to the title company. It is the intentional act of sending a letter or telegram to the buyer with one's name affixed that imports the authentication necessary to satisfy the statute of frauds. Bayyari's act of forwarding the fax to the title company indicates that further steps were needed before there would be a final contract. "'Even when a paper is drawn up as the final obligation, if it be retained by the party signing it, and never in any way delivered as his agreement, it cannot be made use of, even as a memorandum' complying with the Statute of Frauds." *Wyatt v. Yingling*, 213 Ark. 160, 165, 210 S.W.2d 122, 124 (1948) (quoting *Harris v. Dacus*, 209 Ark. 1031, 193 S.W.2d 1006 (1946)). The Berrymans' argument focuses more on the form of a signature rather than on the intent behind that signature.

According to the Berrymans, the requirement that Bayyari sign the instrument is met because Charles Presley placed Bayyari's name on the cover sheet when the legal description was faxed to Bayyari. However, the issue returns to Bayyari's intent regarding the faxed document. There was no evidence presented that Bayyari intended this to be the final agreement. The Berrymans' argument that the closing documents prepared by the title company can be used to satisfy the statute of frauds lacks support because there was no proof that Bayyari or any other person considered those documents to be binding without being signed.

The Berrymans also argue that Bayyari admitted the existence of the contract and that this is sufficient to take the case out of the statute of frauds. The Berrymans briefly argued the point to the trial court, as shown by one sentence in the record. However, the trial court

did not specifically rule on this issue. Our courts have repeatedly held that a party's failure to obtain a ruling is a procedural bar to this court's consideration of the issue on appeal. *See*, *e.g.*, *Doe v. Baum*, 348 Ark. 259, 72 S.W.3d 476 (2002); *Olsen v. East End Sch. Dist.*, 84 Ark. App. 439, 143 S.W.3d 576 (2004).

We cannot say that the trial court erred in granting the motion to dismiss on the basis that there was no writing signed by Bayyari.

In their second point, the Berrymans argue that the trial court erred in dismissing their complaint because there was partial performance of the oral agreement and detrimental reliance by the Berrymans to take the case out of the statute. An oral agreement can be taken out of the statute of frauds if the making of the oral contract and its performance is proven by clear and convincing evidence. *Cobb v. Leyendecker*, 89 Ark. App. 167, 200 S.W.3d 924 (2005). Clear and convincing evidence "is evidence by a credible witness whose memory of the facts about which he testifies is distinct, whose narration of the details is exact and in due order, and whose testimony is so direct, weighty, and convincing as to enable the fact-finder to come to a clear conviction, without hesitation, of the truth of the facts related." *Id.* at 170-71, 200 S.W.3d at 926.

The partial performance, according to the Berrymans, includes Bayyari entering on the Berrymans' property in order to install utility infrastructure such as drainage pipes. However, in their complaint, the Berrymans alleged that, as part of the transaction where they acquired the one-acre tract, Bayyari had agreed to install such infrastructure but had failed to do so. If Bayyari were installing the utility infrastructure as part of the transaction whereby the Berrymans acquired the one-acre tract, that same performance could not be

held to be the part performance necessary in order to take the agreement for the purchase of the three acres out of the statute of frauds because it did not relate solely to the oral agreement of purchase at issue. *See Rolfe v. Johnson*, 217 Ark. 14, 228 S.W.2d 482 (1950); *Smith v. Malone*, 83 Ark. App. 99, 117 S.W.3d 643 (2003).

Relying on *Ferguson v. C.H. Triplett Co.*, 199 Ark. 546, 134 S.W.2d 538 (1939), the Berrymans argue that partial payment alone may be sufficient to remove a case from the statute of frauds. However, in later cases the supreme court has indicated that partial payment alone would not take the agreement out of the statute of frauds. *White v. White*, 254 Ark. 257, 493 S.W.2d 133 (1973); *French v. Castleberry*, 238 Ark. 1038, 386 S.W.2d 482 (1965); *Rolfe*, *supra*. The trial court recognized this in ruling from the bench. It is undisputed that the Berrymans neither paid any part of the purchase price nor entered into possession of the three acres.

Finally, the Berrymans argue that the trial court erred in dismissing their complaint because they detrimentally relied on Bayyari's oral promise to convey the three acres by conveying an easement to him and allowing him to install the utility infrastructure. In *Taylor v. Eagle Ridge Developers, LLC*, 71 Ark. App. 309, 29 S.W.3d 767 (2000), this court held that estoppel may prevent the application of the statute of frauds. *See also Van Dyke*, *supra*. Unlike *Taylor* and *Van Dyke*, no writing had ever been signed by either party in the present case. In order for promissory estoppel to apply, the party claiming estoppel must prove he relied in good faith on the wrongful conduct and has changed his position to his detriment. *Taylor*, *supra*; *see also Waterall v. Waterall*, 85 Ark. App. 363, 155 S.W.3d 30 (2004). Here, the proof of the Berrymans' "reliance" on Bayyari's promise, the construction of the utility

infrastructure, is not attributable solely to the oral purchase agreement; it is also part of the original transaction where the Berrymans purchased the one-acre tract from Bayyari.

Affirmed.

MARSHALL and MILLER, JJ., agree.